14-840

No.

Supreme Court, U.S.
FILED
JAN 15 2015
OFFICE OF THE CLERK

In the Supreme Court of the United States

FEDERAL ENERGY REGULATORY COMMISSION,
PETITIONER

v.

ELECTRIC POWER SUPPLY ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission reasonably concluded that it has authority under the Federal Power Act, 16 U.S.C. 791a *et seq.*, to regulate the rules used by operators of wholesale-electricity markets to pay for reductions in electricity consumption and to recoup those payments through adjustments to wholesale rates.

PARTIES TO THE PROCEEDING

Petitioner, the Federal Energy Regulatory Commission, was the respondent in the court of appeals.

Respondents American Public Power Association, California Independent System Operator Corporation, Edison Electric Institute, Electric Power Supply Association, National Rural Electric Cooperative Association, Old Dominion Electric Cooperative, and Public Utilities Commission of the State of California were the petitioners in the court of appeals.

Respondents American Municipal Power, Inc., Lower Mount Bethel Energy, LLC, Madison Gas and Electric Company, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, PJM Power Providers Group, PPL Brunner Island, LLC, PPL Electric Utilities Corporation, PPL EnergyPlus, LLC, PPL Holtwood, LLC, PPL Maine, LLC, PPL Martins Creek, LLC, PPL Montour, LLC, PPL Susquehanna, LLC, PSEG Energy Resources & Trade LLC, PSEG Power LLC, Public Service Electric and Gas Company, Southern Minnesota Municipal Power Agency, and WPPI Energy were intervenors in support of the petitioners in the court of appeals.

Respondents American Forest & Paper Association, Coalition of Midwest Transmission Customers, EnerNOC, Inc., EnergyConnect, Inc., Maryland Public Service Commission, Pennsylvania Public Utility Commission, PJM Industrial Customer Coalition, PJM Interconnection, L.L.C., Steel Producers, Viridity Energy Inc., and Wal-Mart Stores, Inc. were intervenors in support of the respondent in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Federal Energy Regulatory Commission (FERC or Commission), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 753 F.3d 216. FERC Order No. 745 (Pet. App. 49a-172a) is reported at 134 FERC ¶ 61,187. FERC Order No. 745-A (Pet. App. 173a-275a) is reported at 137 FERC ¶ 61,215. FERC Order No. 745-B (Pet. App. 276a-281a) is reported at 138 FERC ¶ 61,148.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2014. Petitions for rehearing were denied on September 17, 2014 (Pet. App. 282a-285a). On December 8, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 15, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 1a-16a.

STATEMENT

As a consequence of technological, legislative, and regulatory changes over the last two decades, much of the Nation's wholesale-electricity market is now run by regional nonprofit entities. Like commodities exchanges, these wholesale-market operators set the rates for wholesale sales of electricity by matching supply and demand in real-time and day-ahead markets. They have typically achieved that balance by increasing the amount of generated power supplied to the grid as electricity demand increases. But in recent years, wholesale-market operators have also balanced supply and demand by paying electricity users to commit to reduce their consumption at particular times, an activity that Congress and the Commission have termed "demand response." Those payments are then recouped in the wholesale rate.

In the orders under review here, FERC established a methodology that wholesale-market operators must use to compute the compensation for demand-response commitments in specified circumstances.

Pet. App. 49a-275a; see 18 C.F.R. 35.28(g)(1)(v). The court of appeals vacated the orders, holding in relevant part that FERC lacked the statutory authority to establish that methodology because, in the court's view, demand response is solely a retail phenomenon subject exclusively to state regulation. Pet. App. 1a-17a.

1. The electric power system consists of three components: the generation of electricity at power plants; the transmission of electricity over long distances on high-voltage lines; and the distribution of electricity to users by "load-serving entities" on low-voltage lines. See Office of Enforcement, FERC, *Energy Primer: A Handbook of Energy Market Basics* 50 (July 2012) (*Energy Primer*).[1] Originally "most electricity was sold by vertically integrated utilities that had constructed their own power plants, transmission lines, and local delivery systems," *New York* v. *FERC*, 535 U.S. 1, 5 (2002), and its sale was regulated only by state agencies. This Court held in 1927, however, that the Commerce Clause bars States from regulating certain interstate electricity transactions, such as a wholesale sale of power (*i.e.*, a sale for resale) by a utility in one State to a company in a different State. See *id.* at 6 (citing *Public Util. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)).

Congress responded to that decision by enacting the Federal Power Act (FPA), ch. 687, Tit. II, 49 Stat. 847 (16 U.S.C. 791a *et seq.*). The FPA established the Federal Power Commission, FERC's predecessor, to regulate certain components of the electric-power

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[1] http://www.ferc.gov/market-oversight/guide/energy-primer.pdf.

system. 16 U.S.C. 792; see 42 U.S.C. 7151(b), 7172(a)(1). Section 824(b) of the FPA gives FERC jurisdiction over (i) "the sale of electric energy at wholesale in interstate commerce," and (ii) "the transmission of electric energy in interstate commerce." 16 U.S.C. 824(b).

Sections 824d and 824e in turn set forth FERC's core regulatory duties. First, FERC must ensure that "any rate, charge, or classification" by a public utility "for or in connection with" interstate transmissions or wholesale sales is "just and reasonable" and not "unduly discriminatory or preferential." 16 U.S.C. 824d(a) and (b), 824e(a). Second, and of particular significance here, FERC must change "any rule, regulation, practice, or contract affecting such rate, charge, or classification" that is "unjust, unreasonable, unduly discriminatory, or preferential." 16 U.S.C. 824e(a).

The FPA also sets out specific limits on FERC's authority designed to preserve a sphere of state jurisdiction. With respect to sales, Section 824(b) provides that, apart from the sales specifically identified in the FPA, the statute "shall not apply to any other sale of electric energy." 16 U.S.C. 824(b)(1). For that reason, FERC lacks jurisdiction to regulate retail sales (*i.e.*, sales to users of electricity), which have long been pervasively regulated by state utility commissions. *New York*, 535 U.S. at 17, 23.

A party aggrieved by a FERC order under the FPA may seek rehearing before the Commission. 16 U.S.C. 825*l*(a). The party may then seek judicial review in the United States Court of Appeals for the District of Columbia Circuit or in another circuit where the relevant public utility is located. 16 U.S.C. 825*l*(b).

2. Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition in the Nation's electricity system. Independent power generators—that is, generators that do not own transmission lines or distribution facilities—have proliferated. See *Transmission Access Policy Study Grp.* v. *FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000) (per curiam), aff'd *sub nom. New York*, *supra*. And "unlike the local power networks of the past," the electricity grid is now national in scope (with three subdivisions), such that "any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce." *New York*, 535 U.S. at 7. As a consequence, "it is now possible for power companies to transmit electric energy over long distances at a low cost." *Id.* at 7-8. But major utilities by and large still own the high-voltage transmission lines. That ownership could permit them "either to refuse to deliver energy produced by competitors or to deliver competitors' power on terms and conditions less favorable than those they apply to their own transmissions." *Id.* at 8-9.

To address that threat to competition, Congress amended the FPA in Title VII of the Energy Policy Act of 1992, Pub. L. No. 102-486, §§ 721-726, 106 Stat. 2915-2921. Those amendments authorize FERC to order utilities that own transmission lines to transmit power sold by competitors. See 16 U.S.C. 824j-824k. In 1996, after issuing a series of utility-specific orders under that new authority, FERC invoked its powers under Sections 824d and 824e to promulgate a general rule addressing the problem. That rule requires transmission-owning utilities to file tariffs offering

nondiscriminatory "open access" transmission services to wholesale power suppliers on standard terms. See *New York*, 535 U.S. at 9-14. The D.C. Circuit and this Court largely upheld the rule against various challenges. See *id.* at 14-28; *Transmission Access Policy Study Grp.*, *supra*.

In the past two decades, FERC has continued to "break down regulatory and economic barriers that hinder a free market in wholesale electricity" and to "promote competition in those areas of the industry amenable to competition." *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1 Of Snohomish Cnty.*, 554 U.S. 527, 536 (2008). In particular, "[t]o further pry open the wholesale-electricity market and to reduce technical inefficiencies caused when different utilities operate different portions of the grid independently," FERC issued a rule encouraging transmission-owning utilities to relinquish control of their transmission lines to nonprofit entities (called "Regional Transmission Organizations" and "Independent System Operators") charged with operating wholesale markets in a nondiscriminatory manner. *Id.* at 536-537; see *Energy Primer* 41-42. These wholesale-market operators, such as the New England ISO and the PJM Interconnection (which operates in the Mid-Atlantic region), have the responsibilities of "[e]nsur[ing] the reliability of the transmission grid," "balanc[ing] supply and demand instantaneously," and "plan[ning] for transmission expansion on a regional basis." *Id.* at 63.

As particularly relevant here, wholesale-market operators run real-time and day-ahead auction markets that set the rates for wholesale electricity in their respective regions. See *Energy Primer* 64. Using

sophisticated computerized systems, the operators match up generators' bids to supply electricity at specified prices with electricity demand from load-serving entities, which then deliver power to consumers in the state-regulated retail market. *Ibid.*; see, *e.g.*, *PJM Markets Fact Sheet* (June 18, 2014).[2] All the accepted bids are paid the "locational marginal price," or LMP, which represents the least-cost price of meeting a marginal increase in demand at each of the many geographic points within a region and so reflects the value of electricity at particular locations and times. *Energy Primer* 65-66; see Pet. App. 3a.

3. a. The traditional way that wholesale-market operators meet increased demand for electricity is by adding more electricity supply to the system. But particularly at peak periods, such as hot summer days, incremental increases in generation can be enormously expensive. Since electricity generally cannot be stored, during such periods the system must take power from the most inefficient power plants. Pet. App. 23a (Edwards, J., dissenting). That results in increased wholesale rates and, at least over the long run, increased retail rates.

An alternative way to balance supply and demand is to decrease demand. In many industries, demand naturally decreases as price increases, but electricity demand has historically been relatively inelastic. See *Energy Primer* 43. Demand can be reduced, however, by paying electricity consumers for commitments to curtail their consumption during peak periods. If those payments are less than the cost of adding more power, they will enable the wholesale-market operator

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[2] http://www.pjm.com/~/media/about-pjm/newsroom/fact-sheets/pjms-markets-fact-sheet.ashx.

to balance supply and demand with a smaller increase in the wholesale price. This practice of paying entities to refrain from taking power from the electricity system is one type of what has been termed "demand response." See *id.* at 46-47. Besides reducing rates, demand response, by decreasing the amount of power necessary to balance supply and demand, reduces the risk of system failures like blackouts and curbs the market power of generators. Pet. App. 60a-61a.

Demand-response programs exist in both retail and wholesale markets. See *Energy Primer* 47-48. At the retail level, States are implementing programs like "critical-peak rebates," in which retail customers are given rebates on their bills for curtailing use at peak times. *Id.* at 48. At the wholesale level, third-party aggregators of electricity users, as well as local utilities and large individual users like factories, "bid" demand-response commitments into the wholesale markets, "specifying the hours, number of megawatts and price at which they are willing to curtail." *Ibid.* The market operators then treat those commitments like bids from generators, accepting them if the price is right in light of the level of demand and all other bids.

Wholesale-market operators began using demand-response programs in the early 2000s. See PJM Interconnection C.A. Pet. for Reh'g 3-4. Those operators, however, have varied in the level of compensation paid to demand-response providers, with some using the same LMP methodology used for generators, and others using different approaches. See Pet. App. 63a-65a.

b. In the Energy Policy Act of 2005 (EPAct), Pub. L. No. 109-58, 119 Stat. 594, Congress established as

"the policy of the United States that * * * unnecessary barriers to demand response participation in energy, capacity, and ancillary service markets shall be eliminated." § 1252(f), 119 Stat. 965-966 (16 U.S.C. 2642 note). The "energy" market is the market in electricity at issue here. The "capacity" market involves longer-term commitments designed to spur investment in infrastructure, and "ancillary services" provide electricity to help the grid run efficiently, such as through operating reserves. In 2007, Congress further instructed FERC to develop a national action plan for demand response. See Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 529(a), 121 Stat. 1664 (42 U.S.C. 8279).

In light of these congressional enactments, FERC has issued rules designed to facilitate the participation of demand-response providers in the markets under its regulatory authority. In 2007, FERC permitted all wholesale-market operators to use demand-response commitments for certain ancillary services on a comparable basis with generation resources. See Pet. App. 62a. The following year, FERC adopted new rules requiring all wholesale-market operators to accept bids from demand-response providers in markets for certain ancillary services on a basis comparable to other resources, unless such participation is prohibited by the relevant state regulatory authority. See *ibid.*; see 18 C.F.R. 35.28(g)(1)(i)(A). FERC also required wholesale-market operators to permit an aggregator of retail customers, in certain circumstances, to bid demand-response commitments directly into the wholesale market (again, unless prohibited by state authorities). See 18 C.F.R. 35.28(g)(1)(iii). In addition, FERC ordered wholesale-market operators

to study whether further measures were necessary to eliminate barriers to the participation of demand-response providers in wholesale markets. *Wholesale Competition in Regions with Organized Electric Markets*, 73 Fed. Reg. 64,101-64,102 (Oct. 28, 2008). No party sought judicial review of the 2008 rulemaking.

4. In 2011, after reviewing the reports that it had solicited, as well as thousands of pages of comments from the public, FERC issued Order No. 745, entitled *Demand Response Compensation in Organized Wholesale Energy Markets* (the Rule). See Pet. App. 49a-172a. The Rule imposed a number of requirements on wholesale-market operators designed to eliminate barriers to the use of demand-response commitments in wholesale-electricity markets.

a. The Rule's most significant requirement is the methodology that wholesale-market operators must use to compensate demand-response providers. See Pet. App. 89a-104a. That methodology is LMP—the same methodology used to compensate generators that supply power to the wholesale market (see p. 7, *supra*). Commenters had advocated rates above, below, and at LMP. See Pet. App. 89a. FERC chose LMP after "find[ing], based on the record here[,] that, when a demand response resource has the capability to balance supply and demand as an alternative to a generation resource, and when dispatching and paying LMP to that demand response resource is shown to be cost-effective," it would be "unjust and unreasonable" for a wholesale-market operator to pay "compensation other than the LMP " *Id.* at 90a-91a.

In light of that finding, FERC provided that two conditions must be met before payment of LMP is

required. First, "the demand response resource must be able to displace a generation resource in a manner that serves the [wholesale-market operator] in balancing supply and demand." Pet. App. 91a. In other words, the demand-response commitment must be able to help the operator clear the market. Second, "the payment of LMP for the provision of the service by the demand response resource must be cost-effective" under what the Commission termed the "net benefits test." *Id.* at 92a. That condition ensures that a wholesale-market operator will pay LMP to a demand-response provider instead of adding more power supply only when doing so "results in a reduction in the total amount consumers pay for resources that is greater than the money spent acquiring those demand response resources at LMP." *Id.* at 93a.[3]

The Commission rejected the view that the optimal compensation methodology is LMP reduced by the amount that the demand-response provider would have paid for the power that it refrains from consuming (a methodology called "LMP-G"). See Pet. App. 100a-101a. FERC explained that it ordinarily does not "inquire into the costs or benefits of production for the individual resources participating as supply resources in the organized wholesale electricity markets," and that it saw no reason "why it would be ap-

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[3] As the Commission explained, even though LMP is the pricing methodology both for a demand-response commitment and for additional generation, for technical reasons (relating to the effect that a reduction in demand has on the cost of satisfying the remaining demand), it would not be efficient for wholesale-market operators to select a demand-response commitment whenever it is the lowest bid. See Pet. App. 55a-56a, 94a, 229a-230a. That is the reason for the net-benefits test.

propriate for the Commission to continue to apply this approach to generation resources yet depart from this approach for demand response resources." *Id.* at 101a-102a.

The Rule also establishes how demand-response payments must be recouped from wholesale-electricity purchasers. It requires the cost of the payments to be allocated proportionally to all wholesale-market purchasers who benefit from the resulting reduction of the price of wholesale electricity in a particular location on the grid. Pet. App. 128a-129a. In addition, the Rule instructs wholesale-market operators to review their existing measurement protocols for ensuring that demand-response providers are in fact reducing expected power consumption. *Id.* at 123a-125a.

Finally, FERC "reject[ed] challenges to the Commission's authority to set the compensation level for demand response in organized wholesale energy markets." Pet. App. 137a. The Commission pointed to its conclusion in previous rulemakings that "demand response directly affects wholesale rates" when it "is bid directly into the wholesale market." *Wholesale Competition in Regions With Organized Electric Markets*, 74 Fed. Reg. 37,783 (July 29, 2009); see Pet. App. 137a & nn.216-217. Because of that direct effect, the Commission concluded that it "has jurisdiction to regulate the market rules under which [a wholesale-market operator] accepts a demand response bid into a wholesale market." *Id.* at 137a.

b. FERC denied requests for rehearing. See Pet. App. 173a-275a. It again rejected challenges to its statutory authority, explaining that "demand response participation in the organized wholesale energy markets and the market rules governing that participation

are 'practices affecting rates' pursuant to sections [824d and 824e] of the FPA." *Id.* at 188a-200a. FERC further explained that "in the circumstances covered by the Final Rule, demand response resources are direct participants in the organized wholesale energy markets over which [FERC has] jurisdiction," and "that participation has a direct and substantial effect on rates in those markets." *Id.* at 198a. In light of the Rule's limited scope, FERC rejected the argument of some commenters that its interpretation of its statutory authority would encompass "input cost[s] for generation," such as the price of "cement, steel, or coal," that "indirectly affect[] wholesale rates." *Id.* at 197a-198a.

The order on rehearing also rejected various challenges to the substance of the Rule. See Pet. App. 201a-266a. Although a number of state regulatory authorities participated in FERC's rulemaking, no State challenged FERC's authority under the FPA to promulgate the Rule.[4]

c. Commissioner Moeller dissented from the initial order and the order on rehearing. See Pet. App. 156a-172a, 269a-275a. He did not question the Commission's conclusion that it had authority to promulgate the Rule, and he emphasized that "demand response plays a very important role in [wholesale] markets by providing significant economic, reliability, and other market-related benefits." *Id.* at 156a; see *id.* at 269a. But based on the record before the Commission, he would have "allow[ed] the regional [wholesale] markets to continue to develop their own compensation

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[4] FERC issued a brief second order on rehearing that is not relevant here. See Pet. App. 276a-281a.

proposals," or, in the alternative, adopted the LMP-G formula. *Id.* at 172a; see *id.* at 269a-270a.

5. Organizations representing electricity generators and others sought judicial review of the Rule in the D.C. Circuit. A divided panel of the D.C. Circuit vacated the Rule in its entirety as "*ultra vires* agency action." Pet. App. 1a-17a.

a. The court of appeals acknowledged that it was required to "address FERC's assertion of its statutory authority under the familiar *Chevron* doctrine," by asking "'whether the statutory text forecloses the agency's assertion of authority.'" Pet. App. 5a (quoting *City of Arlington, Tex.* v. *F.C.C.*, 133 S. Ct. 1863, 1871 (2013)). The court concluded that the text of the FPA "unambiguously" forecloses FERC from ensuring that the level of compensation paid by wholesale-market operators for demand-response commitments in their markets is just and reasonable. See *id.* at 5a-14a.

The court of appeals began by observing that, "as the Commission concedes, demand response is not a wholesale sale of electricity." Pet. App. 6a. The court then rejected FERC's argument that Sections 824d and 824e, which require the Commission to ensure that "any rule, regulation, practice, or contract affecting [a wholesale] rate" is just and reasonable, 16 U.S.C. 824e(a), authorized the Rule. See Pet. App. 7a. Although the court "agree[d] with the Commission that demand response compensation affects the wholesale market," it saw that effect as no different from the effect of any reduction in retail consumption on the wholesale price. *Ibid.* For that reason, the court believed that the Commission's assertion of authority "has no limiting principle" and "could osten-

sibly authorize FERC to regulate any number of areas, including the steel, fuel, and labor markets." *Id.* at 8a.

Consistent with its position in the administrative proceedings, FERC had distinguished the regulation of retail demand-response programs (as well as the regulation of generation inputs like fuel) from the Rule on the ground that the Rule applies only to demand-response providers who directly participate in wholesale markets by seeking payments from wholesale-market operators that are recouped by adjusting the wholesale rate—not to those who seek payments from outside the wholesale market. See Pet. App. 8a; see also FERC C.A. Br. 34-40. The court of appeals found that distinction unpersuasive, stating that "the directness of participation may be a function of the richness of the incentives FERC commands" and that FERC's "theory also assumes FERC can 'lure' non-jurisdictional resources into the wholesale market in the first place to create jurisdiction." Pet. App. 8a.

In light of its concern that FERC's interpretation of Sections 824d and 824e was too expansive, the court of appeals sought to discern a limiting principle "in the context of the overall statutory scheme." Pet. App. 8a. The court focused on Section 824(a)'s declaration of policy, which states that "FERC's reach 'extend[s] only to those matters which are not subject to regulation by the States.'" *Ibid.* (quoting 16 U.S.C. 824(a)). Because "States retain exclusive authority to regulate the retail market," the court reasoned, Sections 824d and 824e could not be read to authorize FERC to regulate that market. *Id.* at 8a-10a. The court also read the EPAct, which established the na-

tional policy of eliminating barriers to demand response, to "clarif[y]" that "FERC's authority over demand response resources is limited: its role is to assist and advise state and regional programs." *Id.* at 12a-14a.

Based on that reasoning, the court of appeals concluded that "the Federal Power Act unambiguously restricts FERC from regulating the retail market" and therefore that, because "[d]emand response * * * is part of the retail market," the Rule was invalid and the court "need not reach *Chevron* step two." Pet. App. 11a, 14a. But the court briefly added that even if "the statute was ambiguous," the court would "find FERC's construction of it to be unreasonable for the same reasons." *Id.* at 14a.

The court of appeals further held that "[a]lternatively, even if we *assume* FERC had statutory authority to execute the Rule in the first place, [it] would still fail because it was arbitrary and capricious." Pet. App. 15a-17a. The court found that FERC had "failed to properly consider—and engage"—Commissioner Moeller's argument "that [the Rule] will result in unjust and discriminatory rates," which the court believed to be reasonable and persuasive. *Id.* at 15a. The court expressed the view that "the potential windfall to demand response resources" from the Rule's LMP methodology "seems troubling" and held that FERC had failed to provide a "direct response" to that concern. *Id.* at 16a-17a (citation omitted).

b. Judge Edwards dissented. Pet. App. 17a-48a. "The unfortunate consequence" of the majority's decision, he wrote, "is that a promising rule of national significance—promulgated by the agency that has been authorized by Congress to address the matters

in issue—is laid aside on grounds that I think are inconsistent with the statute, at odds with applicable precedent, and impossible to square with our limited scope of review." *Id.* at 48a.

Judge Edwards concluded that "FERC's explanation of its jurisdiction under the Federal Power Act is straightforward and sensible." Pet. App. 31a. In FERC's view, he explained, the wholesale-market operators' "rules governing the participation of demand response resources in the nation's wholesale electricity markets are 'practices affecting [wholesale electricity] rates.'" *Ibid.* He believed that the validity of that position "turn[ed] on a rather straightforward question of statutory interpretation: whether a promise to *forgo* consumption of electricity that would have been purchased in a retail electricity market unambiguously constitutes a 'sale of electric energy' under section [824(b)(1)]," and therefore falls exclusively within the States' jurisdiction. *Id.* at 20a. He found the statute ambiguous on that point and thus would have deferred under *Chevron* to the Commission's understanding of the FPA. *Id.* at 20a-21a, 34a-35a; see *id.* at 200a. And "[a]bsent an affirmative limitation under section [824]," he explained, "there is no doubt that demand response participation in wholesale markets and the [wholesale-market operators'] market rules concerning such participation constitute 'practice[s] affecting' wholesale rates under section [824e]." *Id.* at 21a.

Judge Edwards also concluded that FERC had sufficiently responded to Commissioner Moeller's argument that the LMP methodology would overcompensate demand-response providers. See Pet. App. 22a, 42a-48a.

REASONS FOR GRANTING THE PETITION

In holding invalid an important rule for ensuring the efficiency and reliability of modern wholesale-electricity markets, the court of appeals seriously misinterpreted the FPA and misapplied basic principles of deference to agency interpretations of statutes. The court departed from the interpretive approach to the FPA that this Court has applied for a half-century by attaching overriding significance to Section 824(a)'s declaration of policy, even though FERC's promulgation of the Rule falls squarely within its foundational authority under Sections 824d and 824e. The court's analysis was driven by a concern that FERC's position would permit the Commission to regulate the retail-electricity market and markets in generation inputs, like fuel and steel. That concern was unfounded: The Rule regulates the price that wholesale purchasers of power pay—through the wholesale rate established in auction markets run by wholesale-market operators—for a reduction in consumption by demand-response providers. The demand-response providers are actual and integral participants in wholesale markets themselves and the effect of their participation on the wholesale rate is far more immediate and direct than the effect exerted by retail consumption generally or the markets in generation inputs.

The court of appeals' statutory-authority holding warrants this Court's review. Demand-response commitments are critical to ensuring the efficiency and reliability of the Nation's electricity markets. The court's decision appears to bar FERC from regulating any aspect of demand-response participation in the wholesale markets within the Commission's jurisdic-

tion—a practice that all Commissioners agreed in the rulemaking plays a significant role in those markets. That holding is unlikely to be reviewed by another court of appeals because the FPA's judicial-review provision permits any party to file a petition for review in the D.C. Circuit. 16 U.S.C. 825*l*(b). Accordingly, this Court should grant review.

A. The Court Of Appeals Erred In Holding That FERC Lacked Statutory Authority To Promulgate The Rule

FERC acted within its authority under the FPA in promulgating the Rule.

As the court of appeals recognized, this case is governed by the framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Pet. App. 5a. Under that framework, a court must first "apply[] the ordinary tools of statutory construction" to "determine whether Congress has directly spoken to the precise question at issue.'" *City of Arlington, Tex.* v. *F.C.C.*, 133 S. Ct. 1863, 1868 (2013) (quoting *Chevron*, 467 U.S. at 842). If so, that meaning controls. "But 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 843). Thus, "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *Ibid.* The *Chevron* standard applies both to questions about "the scope of the [agency's] delegated authority" and to questions about the "application of its delegated authority." *Id.* at 1870 (emphases omitted).

Accordingly, the question here is "whether the [FPA's] text forecloses [FERC's] assertion of authori-

ty." *City of Arlington*, 133 S. Ct. at 1871. It does not. To the contrary, FERC's conclusion that it has the authority (and the responsibility) to regulate the compensation paid by wholesale-market operators for demand-response commitments—and recouped in the wholesale rate set in the auction markets run by those operators—is the best and indeed only sensible reading of the statutory text.

1. a. Under Section 824(b), FERC has jurisdiction over "the sale of electric energy at wholesale in interstate commerce"—*i.e.*, the interstate "sale of electric energy to any person for resale." 16 U.S.C. 824(b) and (d). The auction markets run by wholesale-market operators establish the wholesale rates for electricity sold in each operator's region. It is undisputed, therefore, that FERC must ensure that those rates are just and reasonable. See Pet. App. 200a.

It follows that the rules that wholesale-market operators employ in their auction markets fall squarely within FERC's statutory authority to regulate any "rule, regulation, practice, or contract affecting [a wholesale] rate." 16 U.S.C. 824e(a); see 16 U.S.C. 824d(a). For example, the compensation methodology that the markets use to pay generators (LMP) is a direct determinant of the wholesale rates established in the markets. Thus, each wholesale-market operator has a tariff on file with FERC setting forth the rules that govern its markets in electricity, capacity, and ancillary services. See *NRG Power Mktg., LLC* v. *Maine Pub. Utils. Comm'n*, 558 U.S. 165, 169 n.1 (2010).

Like other rules and practices that wholesale-market operators employ, the methodology for compensating demand-response commitments bid into the

wholesale market is a key determinant of the wholesale rate. The level of compensation controls which demand-response commitments the system will accept to balance supply and demand, which in turn determines the market-clearing price of wholesale electricity in the real-time and day-ahead markets. The payments to demand-response providers, moreover, are recouped directly from the rates paid by purchasers of wholesale electricity. Accordingly, like any other facet of the auction markets run by wholesale-market operators, the methodology for compensating demand-response commitments is a "rule, regulation, [or] practice * * * affecting [a wholesale] rate" (and, once accepted, a commitment is a "contract affecting such rate"). 16 U.S.C. 824e(a). Simply put, FERC has plenary authority over the rules of the game in modern wholesale-electricity markets.

A hypothetical illustrates why the contrary conclusion is untenable. Suppose that a wholesale-market operator was vastly *over*paying for demand-response commitments, choosing to utilize them when it would be far more efficient to pay for additional generation instead. That overcompensation would inevitably result in a higher-than-optimal wholesale rate. Given that the FPA requires FERC to ensure that wholesale rates are just and reasonable, it is inconceivable that the Commission would lack authority to act in that situation. And if that is so, no convincing basis exists to distinguish the Commission's decision here to set the compensation level for demand-response commitments prospectively to ensure that demand response is neither overused nor underused—and neither overpaid nor underpaid—in light of its important role in

securing system reliability and efficient pricing. See Pet. App. 59a-61a.

b. No provision of the FPA circumscribes FERC's duty to ensure that the methodology that wholesale-market operators use to compensate demand-response providers results in just and reasonable wholesale rates. Section 824(b)(1) excludes from FERC authority any "sale of electric energy" other than a wholesale sale. See *New York* v. *FERC*, 535 U.S. 1, 20 (2002). But as the court of appeals acknowledged, "[d]emand response does not involve a sale." Pet. App. 6a; see *id.* at 194a (order on rehearing). So that limitation has no application here.

The court of appeals did not identify any other limitation on FERC's authority. The only textual basis for the court of appeals' holding was Section 824(a)'s general "[d]eclaration of policy," which provides that FERC's authority "extend[s] only to those matters which are not subject to regulation by the States." See Pet. App. 8a-9a. But this Court has long held that Section 824(a)'s "mere 'policy declaration' * * * 'cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose.'" *New York*, 535 U.S. at 22 (quoting *F.P.C.* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (quoting *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 527 (1945))). FERC's authority under Section 824e(a) to review and change "any rule, regulation, practice, or contract affecting [a wholesale] rate" is not only a "specific grant of jurisdiction"; it has been the principal basis for federal regulation of wholesale-electricity markets since 1935. See *id.* at 6-7.

The court of appeals nevertheless concluded that Sections 824d and 824e "do not constitute a 'clear and specific grant of jurisdiction'" and therefore do not displace state authority. Pet. App. 9a. That unexplained holding is irreconcilable with this Court's decisions finding state laws preempted by FERC's authority under those provisions—for example, its authority to regulate power allocations among related wholesale purchasers. As this Court has held in that context, "FERC's exclusive jurisdiction applies not only to rates but also to power allocations that *affect wholesale rates*." *Mississippi Power & Light Co.* v. *Moore*, 487 U.S. 354, 371 (1988) (emphasis added); see *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966-967 (1986); see also *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 308-309 (1988) (applying Natural Gas Act, 15 U.S.C. 717 *et seq.*).[5]

The court of appeals found it significant that FERC had acknowledged that Sections 824d and 824e do not "trump[ ] the express limitation on [FERC's] authority to regulate non-wholesale sales" in Section 824(b)(1). Pet. App. 9a (quoting FERC C.A. Br. 34-35). But that is a non sequitur. That an *express* limitation in the FPA cabins the scope of FERC's authority does not mean that the statute's "mere policy dec-

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[5] Because the relevant provisions of the FPA and the Natural Gas Act "are in all material respects substantially identical," this Court follows the "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981) (citation omitted). This Court is considering the preemptive effect of FERC's "affecting" jurisdiction under the Natural Gas Act in *Oneok, Inc.* v. *Learjet, Inc.*, No. 13-271 (argued Jan. 12, 2015).

laration" does. And this Court has already held otherwise. *New York*, 535 U.S. at 22.

In any event, States do not regulate the market rules employed in wholesale markets, and any attempt to do so—including the rules for compensating demand-response commitments bid into those markets—would be preempted. See pp. 25-28, *infra*. For that reason, even were it proper to subordinate the FPA's operative provisions to its general declaration of policy concerning state regulation, the Rule would still be within FERC's authority.

2. The court of appeals' decision rested principally on its belief that accepting the Commission's position would mean that any practice in the retail market—or even in related markets like fuel and steel—would fall within FERC's regulatory ambit. See Pet. App. 8a. That concern is unfounded.

The D.C. Circuit has held that the Commission's statutory authority to regulate rules and practices "affecting" wholesale rates "is limited to those methods or ways of doing things on the part of the utility that *directly affect* the rate or are closely related to the rate." *California Indep. Sys. Operator* v. *FERC*, 372 F.3d 395, 403 (2004) (emphasis added). The Commission has not contested that limitation in this case, because it is amply satisfied. See Pet. App. 137a, 189a-191a & n.54. The level at which demand-response providers are compensated by wholesale-market operators for bids into the wholesale system has "about as 'direct' an effect and as clear a 'nexus' with the wholesale transaction as can be imagined": The payments to demand-response providers are recouped by adjusting the wholesale rate paid by

purchasers in the wholesale market. *Id.* at 40a (Edwards, J., dissenting) (citations omitted).

That is a far closer relationship than the connection between the wholesale rate and *retail-level* demand-response programs, where, for example, local utilities pay consumers to curtail consumption. It is undoubtedly true that in both cases the reduction in demand can exert an effect on the wholesale market. But in the latter case, the compensation for demand-response commitments is not funded by adjusting the wholesale rates charged in day-ahead and real-time markets, and the demand-response commitments are not selected based on their ability to clear the wholesale market. Rather, the demand-response payments are recouped through adjustments to the *retail* rate (potentially over the long term, depending on regulatory requirements). Only an attenuated chain of causation exists between such retail-level demand-response payments and changes to the wholesale rate. That is not true for demand-response commitments bid directly into wholesale-electricity markets.

The court of appeals was thus mistaken in contending that the Commission's exercise of authority here lacks a limiting principle. The Rule "does not purport to regulate demand response writ large; its compensation requirement applies only when the demand response *by definition* alters the wholesale electricity price." Pet. App. 40a (Edwards, J., dissenting). Accepting that straightforward exercise of authority does not mean that FERC could regulate demand response or other activities occurring outside of wholesale markets.

3. The court of appeals' ruling not only misinterprets the text of the FPA, but it also creates exactly

the sort of regulatory gap that Congress sought to close when it enacted the FPA (see pp. 3-4, *supra*). Under settled FPA preemption principles, States could not regulate the wholesale-market rules addressed in the Rule, because such regulation would directly alter the terms of wholesale transactions.

Two decisions from other circuits issued shortly after the decision below are instructive. In *PPL EnergyPlus, LLC* v. *Nazarian*, 753 F.3d 467 (4th Cir. 2014), petition for cert. pending, No. 14-614 (filed Nov. 25, 2014) (*Nazarian*), and *PPL EnergyPlus, LLC* v. *Solomon*, 766 F.3d 241 (3d Cir. 2014), petition for cert. pending, No. 14-694 (filed Dec. 10, 2014) (*Solomon*), the Third and Fourth Circuits held preempted New Jersey and Maryland laws designed to promote new generation facilities—an area expressly reserved to state authority in Section 824(b)(1). The laws directed that local utilities pay new generators a supplemental rate for sales of electricity into wholesale capacity markets, on top of the rate paid by the wholesale-market operator under its FERC-approved tariff. See *Nazarian*, 753 F.3d at 474; *Solomon*, 766 F.3d at 248-249. The circuits each concluded that the challenged law was "field preempted because it functionally sets the rate that [a generator] receives for its sales in the [wholesale-market] auction." *Nazarian*, 753 F.3d at 476; see *Solomon*, 766 F.3d at 253-254. The laws, they explained, "effectively supplant[ed] the rate generated by the auction with an alternative rate preferred by the state." *Nazarian*, 753 F.3d at 476; see *Solomon*, 753 F.3d at 252-253.

If a State attempted to regulate the level of compensation for demand-response commitments bid into wholesale markets, preemption would be even clearer

than in *Nazarian* and *Solomon*. In each of those cases, the challenged law did "not directly affect the terms of any transaction in the federal market," but the courts concluded that "[t]he fact that it does not formally upset the terms of a federal transaction is no defense, since the functional results are precisely the same." *Nazarian*, 753 F.3d at 476-477. Here, however, a state law purporting to set the compensation level for demand response would directly interfere with transactions in wholesale markets and directly alter the rates that those markets charge for wholesale electricity. In *Nazarian* and *Solomon*, moreover, the States were relying on a specific reservation of authority in the FPA, whereas no comparable reservation of authority applies to demand response. See p. 22, *supra*.

Tellingly, the court of appeals did not suggest that state utility commissions could regulate the level of compensation that wholesale-market operators pay for demand-response commitments. The court thus may have intended to suggest that wholesale-market operators should be barred from accepting demand-response bids at all—*i.e.*, that FERC may not approve tariffs that permit the use of demand-response commitments in wholesale markets. If so, its ruling would be tremendously damaging to the electricity system, because demand-response providers play an increasingly important role in ensuring the efficiency and reliability of those markets. See pp. 30-34, *infra*. Even the Rule's challengers, after all, "agree[] that appropriate, economic and efficient participation by [demand-response] resources can provide efficiency benefits (both economic and operational) to wholesale electric markets." Comments of the Electric Power

Supply Association 2, FERC Docket No. RM 10-17 (May 12, 2010). Nothing in the FPA, moreover, suggests that wholesale markets are barred from using demand-response commitments to set wholesale rates. If instead the court simply meant to hold that no regulatory body has authority to review demand-response compensation in wholesale markets, it restored exactly the sort of regulatory vacuum the FPA was designed to eliminate.

4. Even if the FPA were ambiguous as to whether FERC may regulate the rules governing how demand-response providers participate in wholesale-electricity markets, the Commission would be entitled to deference at *Chevron* step two.

The court of appeals' only explanation for holding that the Rule fails *Chevron* step two was to refer back to its step-one analysis and to assert that the "rule entails direct regulation of the retail market." Pet. App. 14a. That is not a reasonable characterization of a rule that governs how wholesale-market operators compensate a resource bid directly into wholesale markets. At most, one might characterize demand response in wholesale markets as a hybrid practice, in which wholesale purchasers of power are charged, as part of the wholesale rate, to incentivize retail end-users not to consume power. Although the court was correct that demand response "involves *retail* customers, their decision whether to purchase *at retail*, and the levels of *retail* electricity consumption," *id.* at 11a, it is equally true that the Rule governs only payments made by *wholesale* power purchasers for demand-response commitments used by *wholesale*-market operators to set the *wholesale* price.

There was no obvious analogue to that sort of practice when the FPA was enacted in 1935. For the reasons discussed above, the unquestionable effect of demand-response commitments bid into wholesale markets on wholesale rates, and the absence of any express limitation in the FPA, conclusively establish FERC's authority to promulgate the Rule. But even if this Court were uncertain on the statutory question, under *Chevron* the ambiguity must be resolved in favor of the Commission. As the Court explained in *New York*, it does no violence to the FPA's reservation of traditional state authority for FERC to exercise authority over practices that are the product of "recent development[s]" and that thus did not exist "at the time that the FPA was enacted." 535 U.S. at 21 & n.13.

B. Review Is Warranted Because This Case Presents A Question Of Substantial National Importance That Is Unlikely To Be Considered By Another Court Of Appeals

The question whether FERC has authority to regulate the participation of demand-response providers in wholesale-electricity markets has substantial national importance and thus warrants this Court's review.

1. a. Even read most narrowly—as invalidating only FERC's authority to regulate the level of compensation paid by wholesale-market operators to demand-response providers in energy markets—the decision below threatens significant damage to the Nation's wholesale-electricity markets.

Both FERC and respondents recognized in the proceedings below that the rate of compensation paid to demand-response providers in wholesale markets has long-term importance for the Nation. FERC

explained that its "regulation of demand response participation in the organized wholesale energy markets and the market rules governing that participation is essential to the Commission fulfilling its statutory responsibility to ensure that [wholesale] rates are just and reasonable." Pet. App. 188a. And Commissioner Moeller, while dissenting on other grounds, similarly recognized that "demand response plays a very important role in these markets by providing significant economic, reliability, and other market-related benefits." *Id.* at 156a. For their part, respondents, in arguing that LMP would overcompensate demand-response providers, contended that selecting the wrong rate would "have negative implications for consumers and the organized wholesale markets over the long term" and lead to "decreased industrial production and lost hours of employment associated with reductions in retail use." Electric Power Supply Association et al. C.A. Br. 55. But under the decision below, it appears that even if FERC had found that wholesale-market operators were systematically *over*-compensating demand-response providers, the Commission would lack authority to act. See p. 21, *supra*.

The court of appeals' holding, moreover, appears to reach much further than the level of compensation. Because the court concluded categorically that "[d]emand response * * * is part of the retail market," Pet. App. 11a, and determined that the FPA "unambiguously restricts FERC from regulating the retail market," *id.* at 14a, its holding throws into serious question whether FERC may review any of the rules established by wholesale-market operators to govern demand-response participation—or perhaps even whether it has authority to permit the participation of

demand-response providers in wholesale-electricity markets at all (see pp. 27-28, *supra*). Indeed, immediately after the court issued its opinion, certain parties submitted complaints to FERC seeking to remove all demand response from wholesale markets (including capacity markets). See *FirstEnergy Serv. Co.* v. *PJM Interconnection, L.L.C.*, FERC Docket No. EL14-55-000 (May 23, 2014); *New England Power Generators Ass'n* v. *ISO New England, Inc.*, FERC Docket No. EL15-21-000 (Nov. 14, 2014). In addition, because the analogous provisions of the Natural Gas Act have been interpreted similarly with the FPA provisions at issue here (see note 5, *supra*), the court's decision injects substantial uncertainty into the future of natural-gas regulation as well.

b. Whether the opinion below is read only to bar FERC from ensuring an appropriate level of compensation for demand-response participation in wholesale markets, or instead to bar FERC regulation of that participation more generally or even to categorically bar such participation altogether, it is likely to have deleterious consequences for the Nation's electricity system in a number of areas:

Electricity prices. The optimal use of demand response in wholesale-electricity markets—which cover two-thirds of the Nation's electricity load—is likely to produce lower electricity prices. See *Energy Primer* 42, 48; see also Md. Pub. Serv. Comm'n and Cal. Pub. Utils. Comm'n C.A. Pet. for Reh'g 9-10 ("Without the availability of cost-effective [demand response] in the energy market, the [wholesale-market operator] would be forced to procure additional generation to assure reliable electric service, at significantly higher costs to electricity consumers."). As FERC found, "a

modest three percent load reduction in the 100 highest peak hours corresponds to a price decline of six to 12 percent." Pet. App. 60a n.15. After the court of appeals issued its decision, an independent market monitor for the PJM Interconnection found a risk of substantial increases in wholesale-capacity costs if demand-side resources (including demand response) were removed from the capacity market. See Monitoring Analytics, *The 2017/2018 RPM Base Residual Auction: Sensitivity Analyses* 5 (July 10, 2014).[6] According to the monitor's analyses, removal of those resources during the 2017-2018 period could result in an increase of more than 100% in the price of capacity, potentially resulting in over nine billion dollars in higher wholesale-electricity charges. See *ibid.*

Reliability and resource adequacy. Demand-response commitments enhance the reliability of the grid. See Md. Pub. Serv. Comm'n and Cal. Pub. Utils. Comm'n C.A. Pet. for Reh'g 12 ("Demand response * * * has been critically important in permitting certain RTOs to maintain reliability."). The Department of Energy has found that, in particular locations at peak times, employing demand response may be the only way to balance supply and demand and thus to avoid power interruptions. See U.S. Dep't of Energy, *National Transmission Grid Study* 41 (May 2002).[7] As the Department has explained, demand reduction "in response to system reliability problems enhances operators' ability to manage the electric grid * * * and reduces the potential for forced outages

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[6] http://www.monitoringanalytics.com/reports/Reports/2014/IMM_20172018_RPM_BRA_Sensitivity_Analyses_20140710.pdf.

[7] http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/TransmissionGrid.pdf.

or full-scale blackouts." U.S. Dep't of Energy, *Benefits of Demand Response in Electricity Markets and Recommendations for Achieving Them* ix-xi (Feb. 2006).[8]

For example, the PJM Interconnection recounted that during extreme weather periods like the 2013 summer heat waves and the "Polar Vortex" in January 2014, it activated demand-response commitments to avoid potential unplanned outages. See PJM Interconnection C.A. Pet. for Reh'g 10-11. It further stated that, for the summer of 2014, demand-response providers in the PJM Interconnection committed over 8000 megawatts of load-reduction capability for the operator to deploy during emergencies or other system stresses. *Id.* at 8. By comparison, a typical new power plant offers only 300 to 700 megawatts of generation capacity. See *ibid.*

Generators' market power. FERC found (and the court of appeals did not contest) that "the direct participation of demand response resources in wholesale markets * * * mitigates the market power of suppliers of electricity because they have to compete with demand response resources and adjust their bidding strategy accordingly." Pet. App. 26a-27a (Edwards, J., dissenting). As the Commission explained, "[d]emand response resources that participate in a wholesale market, especially when market prices are high, tend to lower the market clearing price[,] placing downward pressure on generator offer strategies." *Id.* at 190a.

c. Retail-level demand-response programs are not adequate substitutes for demand-response participa-

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[8] http://emp.lbl.gov/sites/all/files/REPORT%20lbnl%20-1252d.pdf.

tion in wholesale markets. The Pennsylvania Public Utility Commission has explained that "demand response service participation in the wholesale markets is the only mechanism currently available that provides appropriate and timely price signals to a meaningful number of end-use customers." Pa. Pub. Util. Comm'n C.A. Pet. for Reh'g 13. In one state program, for example, the Maryland Public Service Commission "offered to Maryland electricity customers a portfolio of [demand-response] programs financed in part through participation in PJM wholesale markets." Md. Pub. Serv. Comm'n and Cal. Pub. Utils. Comm'n C.A. Pet. for Reh'g 13. And the New England Conference of Public Utilities Commissioners has explained that "the elimination of the ability for demand response to participate in the wholesale energy market would in turn adversely affect the viability of retail price-responsive demand programs." Letter from New England Conference of Public Utilities Commissioners 2-3, FERC Docket No. RM10-17 (July 1, 2014). It is therefore unsurprising that no state agency joined respondents' judicial challenge to FERC's authority to regulate demand-response participation in wholesale markets.[9]

d. The decision below also seriously frustrates objectives established by Congress in Section 1252(f) of the EPAct in 2005. In that statute, Congress made demand-response participation in energy markets a national priority, and the Rule is an important step in promoting demand response.

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[9] After FERC filed its rehearing petition, the Louisiana Public Service Commission filed a letter in the court of appeals in support of the challenge to FERC's authority.

The court of appeals believed that, because the title of Section 1252 uses the word "encouragement" and Section 1252(e) discusses coordination among the States, Congress envisioned only a limited advisory role for FERC. Pet. App. 13a-14a (emphasis omitted). The statutory text does not support that view. Rather, it states in unequivocal terms that "unnecessary barriers to demand response participation in energy, capacity and ancillary service markets *shall be eliminated.*" EPAct § 1252(f), 119 Stat. 966 (emphasis added). No justification exists to ignore wholesale energy, capacity, and ancillary-services markets in implementing that provision.

2. The holding of the court of appeals is unlikely to be reviewed by another circuit. Even assuming that FERC might in the future invest the time and resources necessary to develop a new version of the Rule after its first attempt was declared ultra vires, any party could challenge the new rule in the D.C. Circuit, where the panel's holding would be binding precedent. See 16 U.S.C. 825*l*(b). Accordingly, a circuit conflict is unlikely to develop.

3. FERC does not seek review of the court of appeals' alternative ground for vacating the Rule: that the Rule is arbitrary and capricious because the Commission did not sufficiently respond to dissenting Commissioner Moeller's argument about the appropriate compensation methodology. See Pet. App. 15a-17a. That does not pose any jurisdictional or prudential barrier to the Court's consideration of the court of appeals' holding that FERC lacked statutory authority to promulgate the Rule. Were this Court to reverse that holding, on remand FERC could attempt to cure the defects that the court of appeals found by re-

sponding in more detail to the arguments that Commissioner Moeller made, or even by adjusting the compensation methodology. But under the court of appeals' primary legal ruling, the Rule is altogether ultra vires and responding to Commissioner Moeller would not cure the basis for the court of appeals' vacatur of the Rule.

Should this Court harbor any doubts about its ability to consider the question presented in light of the court of appeals' alternative holding, the Court should grant review on both issues. That could be achieved by broadening the question presented to ask whether the court of appeals erred in vacating the Rule. In light of the importance of the statutory-authority question for the future of electricity-market regulation, it is imperative that this Court grant review at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2015

APPENDIX

1. 16 U.S.C. 824 provides in pertinent part:

Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchap-

ter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

* * * * *

2. 16 U.S.C. 824d provides in pertinent part:

Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with

interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

* * * * *

3. 16 U.S.C. 824e provides in pertinent part:

Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a

proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

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4. Section 1252 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 965-966 provides in pertinent part:

SEC. 1252. SMART METERING.

* * * * *

(e) DEMAND RESPONSE AND REGIONAL COORDINATION.—

(1) IN GENERAL.—It is the policy of the United States to encourage States to coordinate, on a regional basis, State energy policies to provide reliable and affordable demand response services to the public.

(2) TECHNICAL ASSISTANCE.—The Secretary shall provide technical assistance to States and regional organizations formed by two or more States to assist them in—

(A) identifying the areas with the greatest demand response potential;

(B) identifying and resolving problems in transmission and distribution networks, including through the use of demand response;

(C) developing plans and programs to use demand response to respond to peak demand or emergency needs; and

(D) identifying specific measures consumers can take to participate in these demand response programs.

(3) REPORT.—Not later than 1 year after the date of enactment of the Energy Policy Act of 2005, the Commission shall prepare and publish an annual report, by appropriate region, that assesses demand response resources, including those available from all consumer classes, and which identifies and reviews—

(A) saturation and penetration rate of advanced meters and communications technologies, devices and systems;

(B) existing demand response programs and time-based rate programs;

(C) the annual resource contribution of demand resources;

(D) the potential for demand response as a quantifiable, reliable resource for regional planning purposes;

(E) steps taken to ensure that, in regional transmission planning and operations, demand resources are provided equitable treatment as a quantifiable, reliable resource relative to the re-

source obligations of any load-serving entity, transmission provider, or transmitting party; and

(F) regulatory barriers to improve customer participation in demand response, peak reduction and critical period pricing programs.

(f) FEDERAL ENCOURAGEMENT OF DEMAND RESPONSE DEVICES.—It is the policy of the United States that time-based pricing and other forms of demand response, whereby electricity customers are provided with electricity price signals and the ability to benefit by responding to them, shall be encouraged, the deployment of such technology and devices that enable electricity customers to participate in such pricing and demand response systems shall be facilitated, and unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated. It is further the policy of the United States that the benefits of such demand response that accrue to those not deploying such technology and devices, but who are part of the same regional electricity entity, shall be recognized.

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5. Section 529 of the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1664-1665 provides in pertinent part:

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SEC. 529. ELECTRICITY SECTOR DEMAND RESPONSE.

(a) IN GENERAL.—Title V of the National Energy Conservation Policy Act (42 U.S.C. 8241 et seq.) is amended by adding at the end the following:

"PART 5—PEAK DEMAND REDUCTION

"SEC. 571. NATIONAL ACTION PLAN FOR DEMAND RESPONSE.

"(a) NATIONAL ASSESSMENT AND REPORT.—The Federal Energy Regulatory Commission ('Commission') shall conduct a National Assessment of Demand Response. The Commission shall, within 18 months of the date of enactment of this part, submit a report to Congress that includes each of the following:

"(1) Estimation of nationwide demand response potential in 5 and 10 year horizons, including data on a State-by-State basis, and a methodology for updates of such estimates on an annual basis.

"(2) Estimation of how much of this potential can be achieved within 5 and 10 years after the enactment of this part accompanied by specific policy recommendations that if implemented can achieve the estimated potential. Such recommendations shall include options for funding and/or incentives for the development of demand response resources.

"(3) The Commission shall further note any barriers to demand response programs offering flexible, non-discriminatory, and fairly compensatory terms for the services and benefits made available, and shall provide recommendations for overcoming such barriers.

"(4) The Commission shall seek to take advantage of preexisting research and ongoing work, and shall insure that there is no duplication of effort.

"(b) NATIONAL ACTION PLAN ON DEMAND RESPONSE.—The Commission shall further develop a National Action Plan on Demand Response, soliciting and accepting input and participation from a broad range of industry stakeholders, State regulatory utility commissioners, and non-governmental groups. The Commission shall seek consensus where possible, and decide on optimum solutions to issues that defy consensus. Such Plan shall be completed within 1 year after the completion of the National Assessment of Demand Response, and shall meet each of the following objectives:

"(1) Identification of requirements for technical assistance to States to allow them to maximize the amount of demand response resources that can be developed and deployed.

"(2) Design and identification of requirements for implementation of a national communications program that includes broad-based customer education and support.

"(3) Development or identification of analytical tools, information, model regulatory provisions,

model contracts, and other support materials for use by customers, States, utilities and demand response providers.

"(c) Upon completion, the National Action Plan on Demand Response shall be published, together with any favorable and dissenting comments submitted by participants in its preparation. Six months after publication, the Commission, together with the Secretary of Energy, shall submit to Congress a proposal to implement the Action Plan, including specific proposed assignments of responsibility, proposed budget amounts, and any agreements secured for participation from State and other participants.

"(d) AUTHORIZATION.—There are authorized to be appropriated to the Commission to carry out this section not more than $10,000,000 for each of the fiscal years 2008, 2009, and 2010."

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6. 18 C.F.R. 35.28 provides in pertinent part:

Non-discriminatory open access transmission tariff.

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(g) *Tariffs and operations of Commission-approved independent system operators and regional transmission organizations.*

(1) *Demand response and pricing.*

(i) *Ancillary services provided by demand response resources.*

(A) Every Commission-approved independent system operator or regional transmission organization that operates organized markets based on competitive bidding for energy imbalance, spinning reserves, supplemental reserves, reactive power and voltage control, or regulation and frequency response ancillary services (or its functional equivalent in the Commission-approved independent system operator's or regional transmission organization's tariff) must accept bids from demand response resources in these markets for that product on a basis comparable to any other resources, if the demand response resource meets the necessary technical requirements under the tariff, and submits a bid under the Commission-approved independent system operator's or regional transmission organization's bidding rules at or below the market-clearing price, unless not permitted by the laws or regulations of the relevant electric retail regulatory authority.

(B) Each Commission-approved independent system operator or regional transmission organization must allow providers of a demand response resource to specify the following in their bids:

(*1*) A maximum duration in hours that the demand response resource may be dispatched;

(*2*) A maximum number of times that the demand response resource may be dispatched during a day; and

(*3*) A maximum amount of electric energy reduction that the demand response resource may be required to provide either daily or weekly.

(ii) *Removal of deviation charges.* A Commission-approved independent system operator or regional transmission organization with a tariff that contains a day-ahead and a real-time market may not assess charge to a purchaser of electric energy in its day-ahead market for purchasing less power in the real-time market during a real-time market period for which the Commission-approved independent system operator or regional transmission organization declares an operating reserve shortage or makes a generic request to reduce load to avoid an operating reserve shortage.

(iii) *Aggregation of retail customers.* Each Commission-approved independent system operator and regional transmission organization must accept bids from an aggregator of retail customers that aggregates the demand response of the customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, and the customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, where the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an aggregator of retail customers. An independent system operator or regional transmission organization must not accept bids from an aggregator of retail customers that aggregates the demand response of the customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, where the relevant electric retail regulatory authority prohibits such customers' demand response to be bid into organized markets by an aggregator of retail customers, or the customers of utilities

that distributed 4 million megawatt-hours or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an aggregator of retail customers.

(iv) *Price formation during periods of operating reserve shortage.*

(A) Each Commission-approved independent system operator or regional transmission organization must modify its market rules to allow the market-clearing price during periods of operating reserve shortage to reach a level that rebalances supply and demand so as to maintain reliability while providing sufficient provisions for mitigating market power.

(B) A Commission-approved independent system operator or regional transmission organization may phase in this modification of its market rules.

(v) *Demand response compensation in energy markets.* Each Commission-approved independent system operator or regional transmission organization that has a tariff provision permitting demand response resources to participate as a resource in the energy market by reducing consumption of electric energy from their expected levels in response to price signals must:

(A) Pay to those demand response resources the market price for energy for these reductions when these demand response resources have the capability to balance supply and demand and when payment of the market price for energy to these resources is cost-

effective as determined by a net benefits test accepted by the Commission;

(B) Allocate the costs associated with demand response compensation proportionally to all entities that purchase from the relevant energy market in the area(s) where the demand response reduces the market price for energy at the time when the demand response resource is committed or dispatched.

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